

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-40, 43-73, 75-99 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 13-36 of copending Application No. 11/129,760. Although the conflicting claims are not identical, they are not patentably distinct from each other because the present application does not recite a handgrip portion that does not house any part of an electric motor as does 11/129,760. It would have been obvious to have the handgrip in the presently claimed device not house an electric motor for savings in manufacturing costs and for weight savings.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

4. Claims 1, 2, 4-11, 13-19, 21-27, 29-33, 35-40, 42, 43, 47-58, 61-70, 81-98 are rejected under 35 U.S.C. 102(a) as being anticipated by German-9319361. ('361)  
(New Rejection)

Reference is made to the entire English language translation of '361 along with all of the drawing figures. The '361 reference teaches a rechargeable battery on a drive assembly, which assembly could be an orthopedic assembly wherein a battery receiving portion has a pair of tracks defining flanges 6, 7 and a battery includes a pair of grooves 26, 27 to receive the flanges of the tracks. The releasable attachment means in '361 includes the slots 8, 9 and the blocking members 31. The battery terminals comprise flat plate members 14/15 and 16/17 and the battery contacts comprise flexible arcuate members 23, 24. The rechargeable batteries comprise the multiple cylindrical cells as seen in Figure 8 of '361 and meet the claimed recitations.

5. The affidavit filed on 20 December 2006 under 37 CFR 1.131 has been considered but is ineffective to overcome the '361 reference.

The evidence submitted is insufficient to establish a reduction to practice of the invention in this country or a NAFTA or WTO member country prior to the effective date

of the '361 reference. Applicant has not set forth in the submitted 131 declaration where the invention was reduced to practice, i.e., what country where the invention was made.

The evidence submitted is insufficient to establish diligence from a date prior to the date of reduction to practice of the '361 reference to either a constructive reduction to practice or an actual reduction to practice. Applicant's state that the conception of the invention was before February 10, 1994 and that it was reduced to practice by the filing of a patent application on June 10, 1994. However, applicant has not submitted information for support of diligence from a date of conception before February 10, 1994 to the date of the reduction to practice on June 10, 1994. Applicant has submitted no evidence to support the gap between these two dates.

Also, both inventors are required to sign the 131 affidavit.

Finally, the affidavit does not explain the drawings submitted therewith and has not pointed out the relevancy of the drawings in relationship to the claimed subject matter. See In re Borkowski, 184 USPQ 29.

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

7. Claims 3, 12, 20, 28, 34 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. (New Rejection)

The use of the word "adapted" in these claims renders them indefinite because it is not known if the second end actually abuts a support shoulder of the top portion of the battery housing or not. Clarification is required.

8. Claims 72, 73, 75-79 are objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claims, or amend the claims to place the claims in proper dependent form, or rewrite the claims in independent form.

Claims 72 and 73 depend from claim 99 which is improper and claims 75-79 depend directly or indirectly on claim 73 and are thus objected to.

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to John S. Maples whose telephone number is 571-272-1287. The examiner can normally be reached on Monday-Friday, 7:00-3:30.

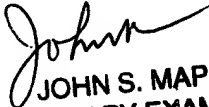
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patrick Ryan can be reached on 571-272-1292. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

JSM/1-21-2008

  
JOHN S. MAPLES  
PRIMARY EXAMINER